

Chiu (Migration) [2018] AATA 1915 (30 April 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Yu-Feng Chiu

CASE NUMBER: 1702350

DIBP REFERENCE(S): BCC2016/3176109

MEMBER: Adrienne Millbank

DATE: 30 April 2018

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl. cl.820.221 of Schedule 2 to the Regulations
- r.2.03A
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- Statement made on 30 April 2018 at 10:58am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Sponsorship limitation – Five years have passed up to the time of this decision – De facto relationship – Registered relationship – Pooled financial resources – Family household – Joint responsibility for their son's care – Sponsor's father – Credible witness – Decision under review remitted

LEGISLATION

Migration Act 1958 ss 5BC, 5CB, 5F, 65

Migration Regulations 1994 rr 1.09A, 1.20J, 2.03A Schedule 2 cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 27 January 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 24 September 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) or 820.221(4)(a). Insufficient evidence was provided to satisfy the Delegate that the parties were in a genuine spouse or de facto partner of the sponsor, as defined under section 5F and 5BC of the Migration Act, and the applicant therefore did not satisfy cl.820.211(2)(a). The Sponsor had previously sponsored an applicant for a Partner (subclass 820/801) visa, which was granted on 14 December 2013. As five years had not passed since the first approved sponsorship, the Delegate found the sponsor did not satisfy Regulation 1.20J, and therefore did not satisfy 820.221(4)(a).
4. The Delegate wrote to the applicant on 25 October 2016, requesting evidence of relationship, and requesting evidence and/or a submission as to a compelling reason or reasons to waive Regulation 1.20J. No response was received.
5. The applicant appeared before the Tribunal on 17 April 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and two supporting witnesses.
6. The applicant was represented in relation to the review by her sponsor.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The applicant was born in Taiwan in 1986 and first arrived in Australia on 11 November 2014 on a Work and Holiday (subclass 417) visa. She was granted a second Work and Holiday (subclass 417) visa on 14 July 2015. The Partner visa application was lodged on 24 September 2016, and she was granted a Bridging A visa in association with this application.
9. The sponsor was born in Maryborough in 1992. The parties claim that they first met in February 2015, when they were working for the same fruit-packing business. They claim they entered into a de facto relationship in April 2015. Their son was born in Maryborough on 10 April 2016. They registered their relationship in Brisbane on 6 March 2017.
10. The sponsor has previously sponsored an applicant for a Partner (subclass 820/801) visa: the application was lodged on 11 April 2013, and the visa granted on 8 August 2013. The relationship ended on 6 June 2013, with the visa being granted on Family Violence grounds.

11. A large amount of documentary evidence, including statutory declarations; written submissions; photographs, bank statements; and tenancy agreements, supporting the parties' claim to be in a genuine relationship, and to have compelling circumstances to justify a waiver the r.12.0J criterion, was provided to the Tribunal. The Tribunal asked the applicant why she had not responded to the Delegate's request of 25 October 2016, for further evidence and information. She stated that she overlooked the email because it was sent at a time when she was preoccupied and distracted, after the birth of her son.
12. The Tribunal found the parties and their supporting witness, the sponsor's father, to be credible witnesses who were open and responsive to questions at hearing. The Tribunal accepted their testimony and the other evidence they provided.
13. The issue in the present case is whether the parties were in a genuine de facto relationship at the time of application and decision, and whether there are compelling circumstances (affecting the sponsor) to justify a waiver of the r.1.20J sponsorship limitation.

Whether the parties are in a spouse or de facto relationship

14. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.
15. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
16. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

Financial aspects of the relationship

17. Statements from the parties' joint savings account, tax statements and payslips, were provided. At hearing the sponsor described how the parties' earnings went into their own personal accounts, which they used for household purposes including rent and utilities and other bill payments, and placed any surplus funds into the joint account as savings.
18. The applicant stated that they had not achieved much in the way of savings, because she has been out of employment. At the time of decision, the family is living off the sponsor's full time earnings from his work in a fruit-packing company in Mundubbera. The parties described plans to both seek employment and, in the longer-term, purchase a home, in Hervey Bay or Maryborough, where many of the sponsor's family live.
19. No evidence was provided that either of the parties owes any legal obligation in respect of the other. At hearing, however, the parties demonstrated familiarity with each other's bank accounts and earnings, and described joint plans and aspirations. While they confirmed at hearing that they as yet have no significant joint assets or liabilities, the Tribunal finds that

they have pooled their financial resources and share day-to-day household expenses commensurate with being in a genuine de facto relationship.

Nature of the household

20. Evidence was provide in the form of copies of joint tenancy agreements, photos, utilities bills in joint names, and mail addressed to both parties, that they have lived together, in Mundubbera, since April 2015; and that they have lived together in Mundubbera with their son since his birth in April 2016.
21. In written statements the applicant described how when she was working in a fast-food outlet in Mundubbera, she and the sponsor organised their shifts so one of them could care for their son. The sponsor at hearing described the household routine whereby he makes breakfast and cares for his son early in the morning, so the applicant, whose sleep is still broken through night feeds, can rest for longer; how after work he take cares of his son while the applicant prepares the evening meal; and how he sometimes cooks the evening meal.
22. The parties described efforts to enrol their son in child-care in Mundubbera, and plans to enrol him in kindergarten in Mundubbera or Maryborough. The applicant described plans she has to study towards obtaining Australian recognition of the interpreting/translating qualifications she obtained from a university in Taiwan. She stated that she is planning on working as much as possible from home, because she believes it important for a child's development to be cared for by their mother until the age of three, and she and the sponsor want to have another child.
23. The Tribunal finds on the evidence provided that the parties have established a family household where they share the housework, and that they are jointly responsible for the care and support of their son.

Social aspects of the relationship

24. Statutory declarations were provided by family members, colleagues, employers and friends, attesting to the genuineness of the relationship. The sponsor's father at hearing provided eloquent testimony, advising that he has known the applicant since she was a friend and work-mate of the sponsor, and observed the relationship develop.
25. A large number of photos were provided, showing the parties together and with family and friends at social gatherings, from 2015 to 2018. Evidence was provided that the sponsor travelled with the applicant to meet her family in Taiwan in November 2015. At hearing the parties described plans to visit Taiwan again, with their son, towards the end of the year. The applicant stated that they have plans for a family wedding, in Maryborough or Hervey Bay, but have not set a date, because it was hard to save for such things while living on one income.
26. The Tribunal finds from the evidence provided, and from observing the parties at hearing, that they represent themselves to other people as being in a de facto relationship; that family members, friends and acquaintances relate to them as a couple; and that they plan and undertake joint social activities as a couple.

Nature of persons' commitment to each other

27. The parties have been in a de facto relationship for three years and have a two-year-old son. They provided a copy of their Queensland Relationship Registration Certificate, showing that their relationship was registered in Brisbane on 6 March 2017.
28. Evidence was provided that the sponsor is listed as the beneficiary in the applicant's superannuation account. From the photos; printouts of Facebook pages; written relationship statements; statutory declarations from family members and friends; and observation of the parties at hearing, the Tribunal finds that they draw companionship and emotional support from each other, and that they see the relationship as long-term.
29. Having considered r.1.09A(3) matters against s.5CB(2)(a)-(c), the Tribunal is satisfied that the parties have a mutual commitment to a shared life to the exclusion of others; that they are in a genuine and continuing relationship; and that they live together or not separately and apart on a permanent basis.
30. The parties are not related by family.
31. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and the time of this decision.
32. The sponsor is the de facto partner of the applicant, and both parties are over 18 years of age. The applicant was a substantive visa holder when the Partner visa application was lodged, and during her time in Australia she has been a lawful non-citizen.
33. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

Is the applicant sponsored?

34. Regulation 1.20J of the Regulations sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship. Under r.1.20J, a sponsor is limited to a total, in a lifetime, of two approved sponsorships or nominations that lead to a grant of a partner visa (or entry permit) or a visa (or entry permit) granted on the basis of the domestic violence provisions. If there has been one previous sponsorship or nomination, or if the sponsor was granted a visa or entry permit as a result of *being* sponsored, a period of 5 years must have passed since the date of the earlier visa application. These requirements apply unless the Minister, or the Tribunal on review, is satisfied there are compelling circumstances affecting the sponsor: r.1.20J(2).
35. As the earlier visa application was made on 11 April 2013, five years have passed up to the time of this decision. Therefore, the sponsorship limitation in r.120J no longer applies.
36. On the evidence before the Tribunal the requirements of cl.820.211 and cl.820.221 are met.
37. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

38. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations
 - r.2.03A

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).